Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U. KHAN and KHAN & ASSOCIATES, an Illinois Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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65 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that a gasoline dealer, who was limited to a margin of 3.25 cents per gallon, was entitled to recover damages under §4 of the Clayton Act, for losses which he claimed from his inability to increase his profit by increasing his price to consumers?

2. Did the court below err in holding that an agreement between a supplier, who was also the landlord of the property on which the business was conducted, and a dealer, under which the dealer's margin or markup was limited was a *per se* violation of the Sherman Act?

3. Did the court below err, in an appeal from a summary judgment, in considering an expert witness report in which the expert had determined that the dealer could have raised his prices because another party operating the gasoline station during a portion of the next year had raised his prices?

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PETITION FOR WRIT OF CERTIORARI

State Oil Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 29, 1996.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 93 F.3d 1358. The underlying judgment of the trial court is reported at 907 F.Supp. 1202. The opinions of the District Court and the Court of Appeals are reproduced in the Appendix to this petition.

JURISDICTION

On August 29, 1996, the United States Court of Appeals for the Seventh Circuit issued its decision reversing the judgment entered by the trial court. Jurisdiction in this Court is based on 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

§1 of the Sherman Act (15 U.S.C. §1)

Contracts, Combinations and Conspiracies in Restraint of Trade

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed

guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§4(a) of the Clayton Act (15 U.S.C. §15[a])

Actions for Damages

(a) Damages; Prejudgment Interest

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only–

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court

order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

STATEMENT OF THE CASE

Defendant State Oil Company was the owner of a parcel of real estate improved with a gasoline station/convenience store. It was also a distributor of gasoline for major oil companies. State Oil Company entered into an agreement with the plaintiff Khan under which it leased the gasoline station/convenience store to him, and also agreed to sell him gasoline for resale to the public. That agreement provided that State Oil Company was to set a suggested retail price for each brand of gasoline, and would sell the gasoline to Khan for 3.25 cents per gallon under that suggested price. The agreement did not require Khan to sell at the suggested price. However, if he raised his price above the suggested price, he was obligated to pay all excess to State Oil.

After Khan had operated the station for a year, a receiver was appointed by a state court. That receiver operated the station for five months. Khan claimed that the receiver had charged a margin in excess of 3.25 cents per gallon during his term of operation, and that this demonstrated that he had lost profits, because he was influenced by the contract provision not to raise his price.

The District Court for the Northern District of Illinois, granted summary judgment in favor of State Oil, holding that there was no showing by plaintiff that the provision

complained of contained any anticompetitive aspect, that the damages claimed by plaintiff were not antitrust damages that there was no evidence that plaintiff actually suffered any injury, and that the rule of reason should be employed in any analysis. The Court of Appeals for the Seventh Circuit reversed, remanding the case to the District Court.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents important questions of federal law which have not been, but should be, settled by this Court:

1. Did the court below err in holding that a gasoline dealer, who was limited to a margin of 3.25 cents per gallon, was entitled to recover damages under §4 of the Clayton Act, for losses which he claimed from his inability to increase his profit by increasing his price to consumers?

The lower court based its decision primarily upon *Albrecht v. Herald Company,* (1968) 390 U.S. 145, 88 S.Ct. 869. The court agreed with State Oil that the damages claimed by Khan did not constitute antitrust damages, and that post *Albrecht* decisions requiring evidence of antitrust injury portend the doom of *Albrecht* (p. 8) It was of the opinion, however, that it was obligated under existing law to reverse the trial court on this question.

This Court in post *Albrecht* decisions has held that a private party bringing suit under §4 of the Clayton Act must establish that the injury which it has suffered is of the type which the antitrust laws were designed to

prevent. To date that principle has been applied only in actions brought by competitors of the defendant. Whether the requirement of antitrust damages would apply in a private antitrust action between a single supplier and a single dealer is an important question of federal law which has not been, but should be, settled by this Court. Analysis of this question also involves questions concerning the continuing viability of *Albrecht v. Herald Company,* supra, and the application of *per se* liability in a situation which presents no obvious threat to competition. This case clearly presents each of these questions. The case also presents a question concerning the standards for acceptance of expert testimony.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* (1977) 429 U.S. 477, 97 S.Ct. 690, 60 L.Ed.2d 701, and in *Atlantic Richfield Co. v. USA Petroleum Co.,* (1990) 495 U.S. 328, 110 S.Ct. 1884, at 1892, 109 L.Ed.2d 333, this Court discussed the requirement that a private party bringing suit under §4 of the Clayton Act, must not only prove an injury resulting from the actions of the defendant, but must also prove that this injury was of a type the antitrust laws were intended to prevent. Both of these decisions post-dated *Albrecht*. Plaintiff in each of those cases was a competitor who was claiming injury, and each contains language which infers that the ruling applies only to a suit by a competitor. The injury claimed in *Atlantic Richfield* was a loss of sales because of a reduction in a competitor's prices. The injury claimed in this case is a loss of profits from an inability to raise prices. This suit was brought by a dealer rather than a competitor. In *Caribe BMW, Inc. v. Bayerische Motoren Werk Aktiengesellschaft*, 19 F.3d 745 (1994), the First Circuit distinguished *Atlantic Richfield Co. v. USA*

Petroleum Co., because the plaintiff was a dealer, not a competitor. The difference presents no economic or legal distinction, because if defendant's actions would not injure competition in a suit by a competitor, they would not injure competition in a suit brought by Khan.

As the lower court stated on page 8, it did not believe that the damages claimed by Khan were antitrust damages. It refused, however, to affirm the trial court on that basis, both because it felt bound by *Albrecht*, and because even though *Albrecht* does not address the question of antitrust damages, the court was unable to state that this Court might not have a broader concept of antitrust damages than that proposed by State Oil.

Injury, "although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny, 'since [i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition." *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct. at 1899. The damages claimed by Khan in this case resulted totally from his inability to charge more to consumers. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct., at 1892. Hence, as the lower court noted (p. 11), they cannot logically give rise to antitrust injury unless antitrust injury arises from interference with the freedom of a dealer as well as from anticompetitive activity.

If the price which plaintiff could charge without incurring any obligation to pay the excess to defendant was at or above what competing stations were charging, he would have been unable to raise his price, and he suffered no injury. If that price was below market, to the extent that he could have raised his price and still maintained his sales, he may have suffered an injury. However, that injury would not be of a type which the antitrust laws were intended to prevent.

2. Did the court below err in holding that an agreement between a supplier, who was also the landlord of the property on which the business was conducted, and a dealer, under which the dealer's margin or markup was limited was a per se violation of the Sherman Act?

The criticism which the decision in *Albrecht v. Herald Company*, supra, has received from antitrust scholars and from the lower courts is an indication that the decision should be reconsidered.[1] The decision of the lower court in this case reads as a petition to this Court to reconsider *Albrecht*. As the lower court pointed out on page 9 of its opinion, the decision in *Albrecht* is inconsistent with the later decisions by this Court. It is also contrary to all of the principles announced by this Court in *Business Electronics v. Sharp Electronics*, (1988) 485 U.S. 717.

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[1] See, for example, Easterbrook, *Maximum Price Fixing*, 48 U.Chi.L.Rev. 886 (1981). Blair and Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539 (1989), 8 Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 1635-38 (1989), Blair, *The Ghost of Albrecht*, 40 The Antitrust Bulletin 205 (1995).

In *Business Electronics v. Sharp*, supra, this Court explained the basis upon which *per se* liability should be applied. It is unlikely, in light of the principles discussed in that decision, that *Albrecht v. Herald Company* would be decided in the same manner were it to come before this Court today, as a matter of first impression. Commencing at page 723, the Court explained what factors should be considered in deciding whether a *per se* analysis or the rule of reason should be applied in any particular case.

> "Certain categories of agreements, however, have been held to be per se illegal, dispensing with the need for case-by-case evaluation. We have said that per se rules are appropriate only for 'conduct that is manifestly anti-competitive,' id. (*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36), at 50, 97 S.Ct., at 2557, that is, conduct 'that would always or almost always tend to restrict competition and decrease output,' *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290, 105 S.Ct. 2613, 2617, 86 L.Ed.2d 202 (1985)." "[W]e have been slow . . . to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." "Per se rules are invoked when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct." "agreements are per se illegal only if their "nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality."

Vertical maximum price fixing is not manifestly anti-competitive and would, under many circumstances, tend to increase competition.

The antitrust laws have been presented in terms of two distinct social or economic objectives. In the price fixing cases, the objective of ensuring the freedom of the individual merchant to make, without restraint, his own market decisions has been given prominence. The trial court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 at 40, 53 L.Ed.2d 568 at 574, 97 S.Ct. 2549 rejected the defendant's proffered instruction that a location restriction was illegal only if it restrained competition in favor of an instruction that a location restriction constituted a per se violation of the antitrust laws.[2] This Court held the rule of reason should apply even though that restriction also related to the freedom of action of the dealer. In more recent decisions, such as *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, and *Business Electronics v. Sharp Electronics*, supra, prominence is given to competition and the benefits which competition presents to the ultimate consumer, rather than on common law principles concerning restraints on alienation. Vertical restraints which limit the area in which a dealer may sell, certainly restrict the freedom of the dealer as much as a limitation on the price at which it can sell. The prevention of anti-competitive behavior is the primary concern of the antitrust laws, not the elimination of restraints on alienation. *Business Electronics v. Sharp Electronics*, (1988) 485 U.S. at 726.

This case specifically presents that distinction. The agreement between State Oil and Khan limits Khan's

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[2] See also the reference to *United States v. Arnold, Schwinn & Co*, 388 U.S. 365, 18 L.Ed.2d 1249, 87 S.Ct. 1856 (1967) at 433 U.S. 45 and reference to a portion of the dissent below contained in footnote 21 at 433 U.S. 53.

markup on gasoline which he purchases from State Oil. Such an agreement affects the ability of Khan to maximize his own profit, by increasing the price of gasoline to the public at those times when competitive conditions would permit such an increase. There is no contention that the agreement would affect any competitor of Khan, other than possibly forcing that competitor to also reduce his price to the public. The agreement cannot constitute a violation, as such, unless freedom from restraints on alienation is still regarded as being one of the functions of the antitrust laws.

This Court recognized in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S.Ct. 1884 at 1894, footnote 13 that it is possible for vertical maximum price fixing to have procompetitive effects in certain circumstances. The statement referred to the situation created by exclusive dealerships, and was limited to interbrand competition. However, neither of these limitations need necessarily be applied. Not only can a limitation on pricing have competitive aspects in situations which do not involve exclusive dealerships, but some brands are sold by multiple distributors, who compete with one another as well as with distributors from other firms.

If a manufacturer or supplier is able to limit the prices charged by the retailers it supplies, it reduces the supplier's incentive to operate its own retail outlets, and enhances the supplier's incentive to reduce its own margin in order to increase sales to the consumer. There is normally a limited total markup possible between the manufacturer and the customer. The supplier can increase its profit either by increasing the share of that markup which it takes, or by increasing the sales of the product. The most obvious means of increasing sales is

to reduce the price. However, if the retailer is able to use that reduction to enhance its own profit, leaving the price at the same level, then there is no incentive to the supplier to reduce its price. This is the essence of competition.

This Court has already recognized that some types of vertical restraints, such as limitations on the territory in which a dealer can sell are not necessarily anticompetitive, and may actually have a competitive function in some situations. However, because of prior authority, it has refused to extend that analysis to restraints which specifically affect prices. It is time to consider the possibility that such a distinction is artificial. This case presents the perfect vehicle for such a comparison.

In this particular case, the trial court examined the facts, determined that the agreement between plaintiff and defendant did not impose an unreasonable restraint on competition, and granted summary judgment in favor of the defendant. The Court of Appeals agreed that absent *per se* liability, the trial court would be correct. However, that court reversed, holding that it was obligated to find *per se* liability. The effect of this ruling is that the defendant is conclusively presumed to have engaged in an activity which is in violation of §1 of the Sherman Act, even though the circumstances presented no aspect of any restraint on competition. The characterization of the agreement automatically entitles the plaintiff, who has made no claim of any anticompetitive effect, to treble damages and to payment of its attorney's fees. Formalistic characterization is part of what this Court rejected in *Business Electronics*, supra.

Even if this were an aberration in which a unique circumstance created an unjust result from an otherwise

valuable rule of law, there should be some means of sorting out the blatantly inapplicable situation. There are possible stopping points between forcing an injured plaintiff to go the expense of proof under the rule of reason, and placing an inappropriate defendant in a position in which he is not permitted to defend himself. In situations such as this one, involving a single plaintiff and a single defendant, operating in a massive market, the defendant could be permitted to prove that the purpose and effect were competitive, not anticompetitive. In the alternative, the plaintiff could be required to establish at least some possibility of anticompetitive effect. Expense would be reduced if this determination were made by the court as a preliminary matter. For example in this particular case, defendant could be permitted to establish its relative market share, or its competitive position in a market containing competitors such as Amoco or Shell. This would be neither time consuming nor expensive, and would limit *per se* liability to those situations in which it is appropriate. As the trial court stated on page 14 of its ruling, "Courts must not trivialize the power of the Sherman Act by bestowing an aura of federal antitrust significance upon minor business disputes."

This is not a situation involving a rule of law which has an accepted and recognized value overriding specific inapplicable situations. The rule which was applied has been routinely and universally criticized from its inception. This case squarely presents questions concerning the application of *per se* liability, and of the continuing viability of the decision in *Albrecht v. Herald Co.*, either *in toto* or in the manner of its application to circumstances which vary from those presented in that case.

3. Did the court below err, in an appeal from a summary judgment, in considering an expert witness report in which the expert had determined that the dealer could have raised his prices because another party operating the same gasoline station during a portion of the next year had raised his prices?

In an attempt to establish that he had suffered an injury, Khan presented the report of an expert who expressed an opinion that Khan had lost potential profits from sales at increased prices. As the lower court noted (p. 12), the expert obtained the financial records of a receiver who had operated the station during five months of the year after Khan's operation of the station. The expert determined from those figures that the receiver had realized more than the 3.25 cents per gallon which had been permitted to Khan. The expert determined from this that if Khan had not been limited, he also could have earned more than 3.25 cents per gallon. One of State Oil's objections to that report was that no consideration was given to comparative conditions in the area during the two years. The fact that the receiver was able to sell at a higher price is not evidence that Khan would have been able to sell at a higher price the year before. As both the trial judge and State Oil pointed out, the report was based totally on *post hoc ergo propter hoc*. The trial judge refused to accept this report, in part because it was based on the unsupported assumption that the experience of the receiver was relevant to the experience of Khan during the prior year. See pages 14, 15 and 16 of ruling. The Court of Appeals reversed, stating that the report was sufficiently plausible to defeat summary judgment.

The Court of Appeals (p. 13) analyzed the question in terms of whether the report was generated by the methods which the witness would use in his normal academic or professional work, which is to say in work undertaken without reference to or expectation of possible use in litigation. The Court of Appeals went on to state that neither the district judge nor State Oil identified any basis for supposing that the report flunked this test. The expert explained the method which he used to arrive at his conclusion that the receiver had earned a margin in excess of 3.25 cents per gallon. That, however, was not the question requiring expertise. On the grounds for his assumption that the receiver's experience provided a model upon which to gauge the experience of Khan, the expert provided no explanation.

No evidence was presented to establish that an economist wishing to determine the price which a party could have charged during a particular period of time would reasonably rely upon data concerning activities at a subsequent time. The burden of establishing the validity of a questioned report would normally be on the party presenting that report.

As this Court stated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 113 S.Ct. 2786, at 2795, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. If the trial judge concludes that the scintilla of evidence supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, it remains free to grant summary judgment. A report of this type, based entirely on hearsay should be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in

forming opinions or inferences upon the subject." *Daubert*, supra at 2798. The primary responsibility of the trial judge, as explained in *Daubert*, is to ensure that reliable and scientifically presentable methods and theories have been used. The expert in this case provided nothing but a bottom line, with absolutely no explanation of how he got from the bottom line to the ultimate question.

CONCLUSION

As pointed out in the concurring opinion in the lower court (p. 16), that court employed a rigorous application of the rules of stare decisis and precedent. This was a rigorous application of principles which have been regularly criticized, applied to a set of facts presenting serious distinguishing characteristics. The principles applied in this case affect the marketing methods utilized (or not utilized) in the American business community. These principles should be reconsidered by the Court at this time.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-1309

BARKAT U. KHAN and KHAN & ASSOCIATES, INC.,

Plaintiffs-Appellants,

v.

STATE OIL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 35—Charles R. Norgle, Sr., *Judge.*

ARGUED JUNE 7, 1996—DECIDED AUGUST 29, 1996

Before POSNER, *Chief Judge*, and FLAUM and RIPPLE, *Circuit Judges.*

POSNER, *Chief Judge.* The plaintiffs (collectively "Khan") operated a gas station in DuPage County, Illinois, under a contract with State Oil Company, a distributor of gasoline and related products. The contract provided for the lease of the station (which State Oil owned), and the supply of gasoline and ancillary products for resale, to Khan. Mr. Khan was the actual signatory of the contract, rather than his corporation, which operated the station, so it does not appear that he is complaining about a merely derivative injury to himself, in which event he would not be a proper party. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 777 (7th Cir. 1994).

State Oil terminated the contract because Khan failed to pay the agreed-upon rent for the station. The termination precipitated this suit, which, so far as relevant to the appeal, charges price fixing in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and breach of contract under the common law of Illinois. The district judge granted summary judgment for the defendant on both claims. He ruled that the legality under the Sherman Act of the alleged price fixing was to be tested by the rule of reason rather than by the per se rule, that the plaintiff had presented no evidence on essential elements of a rule of reason case (such as market power), that the study conducted by the plaintiffs' economic expert was inadmissible, and that without the study the plaintiffs could not even prove injury.

The contract between State Oil and Khan provided that State Oil would establish a suggested retail price for the gasoline (which was sold under the brand name "Union 76") and would sell the gasoline to Khan for 3.25 cents less than that price. If Khan believed the price was too high he could ask State Oil to lower it and if State Oil complied Khan would be entitled to purchase the gasoline from State Oil at the same margin, that is, at the new price minus 3.25 cents. If State Oil refused to reduce the suggested retail price Khan could still charge a lower price, but his margin would be smaller because he would not be getting a lower price from State Oil. If Khan believed the suggested retail price was too low he could ask State Oil to raise it, thus preserving his margin; but if State Oil refused and Khan went ahead and raised his price anyway, the contract required Khan to rebate the difference between his new price and the suggested price times the number of gallons sold at the new price. The contract thus required Khan to rebate the entire profit from raising his price without his supplier's permission above the retail price suggested by the supplier.

The provision concerning the charging by Khan of a price below the suggested retail price neither is price fixing nor is germane to the price-fixing charge. A supplier is under no obligation to lower his price to his customer just because the customer wants to resell the supplier's product for less than the supplier has suggested without sacrificing any of his profit margin. The contract in this case merely disclaims any such unusual obligation, and since the obligation has no basis in antitrust law the disclaimer has no antitrust significance either.

State Oil also denies that the provision in the contract pertaining to Khan's charging a price above the suggested retail price is a form of price fixing. It points out that Khan was free to charge as high a price as he wishes. This is true in the sense that it would not have been a breach of contract for Khan to raise his price. But the contract made it worthless for him to do so; and, realistically, this was just an alternative sanction to termination, and probably an equally effective one. Generally when a seller raises his price, his volume falls; and if his profit on each unit sold is frozen, the effect of his raising his price will be that he loses revenue: he will sell fewer units, at the same profit per unit. The contract, incidentally, required Khan to buy all his gasoline from State Oil; so he could not merely switch to another brand if he wanted to charge a higher price.

Practices that have the same effect are not always treated the same in law. More precisely, two practices that have one effect in common may differ in their other effects. A merger between competitors and a price-fixing agreement between competitors has the same effect in extinguishing price competition between the parties, but the merger is more likely to produce offsetting cost savings and it is therefore treated more leniently by the antitrust laws. So the fact that State Oil's rebate scheme was as effective in deterring Khan from raising his price as a threat to terminate his lease would have been does not dictate that the two practices be treated identically under the antitrust laws. But State Oil has not identified any other relevant difference between the two methods of preventing a dealer from charging more than the sug-

gested retail price. The purely formal character of the distinction that it urges can be seen by imagining that the contract had forbidden Khan to exceed the suggested retail price and had provided that if he violated the prohibition the sanction would be for him to remit any resulting profit to State Oil. There is no practical difference between that form of words and permitting Khan to sell at a higher price but providing that if he does so the profit belongs to State Oil.

So State Oil engaged in maximum price fixing; the next question is whether this practice is illegal per se, meaning that all the plaintiff need prove to prevail is that the defendant engaged in the practice; investigation of its actual economic effects is pretermitted. E.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-44 (1982). Challenged practices that do not fall within any of the per se categories are subject to the broader-ranging inquiry into effect and motives that goes by the name of the "rule of reason" and that requires the plaintiff to prove that the defendant's conduct actually (or with a high likelihood) reduced competition. *Id.* at 343; *Business Electronics Corp. v. Sharp Electronics Corp.*, *supra*, 485 U.S. at 723. Price fixing has long been illegal per se. In its usual and most pernicious form, the term refers to an agreement or conspiracy between competing firms to fix a minimum price for their product. By a modest extension it refers also to an agreement between competitors to fix either a minimum or a maximum price for the resale of their product by their dealers. See *Arizona v. Maricopa County Medical Society*, *supra*, 457 U.S. at 348; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). Why might competitors fix a minimum resale price? In order to make it more difficult for any of them to engage in undetected violations of their agreement to fix their own (that is, the wholesale) prices; a supplier who observed that he was losing sales because his competitor's dealers were selling the competitor's product at a low price would know that the competitor was failing to enforce the price-fixing agreement. Pauline M. Ippolito & Thomas R. Overstreet, Jr., "Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works," 39 *J. Law & Econ.* 285, 293-94 (1996). Why might competitors fix a maximum resale price? The difference between what a supplier charges his dealer and what the dealer charges the ultimate customer is, functionally, compensation to the dealer for performing the resale service; so by agreeing on the resale prices of their goods competing sellers can reduce their dealers' margin below the competitive price for the dealers' service. This is a form of monopsony pricing, which is analytically the same as monopoly or cartel pricing and so treated by the law. E.g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

The questionable next step (logically, not chronologically, next) in the evolution of antitrust law was to affix the per se label to contracts in which a single supplier, not acting in concert with any of its competitors, fixed its dealers' retail prices. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Here the economic difference between fixing a minimum resale price and fixing a maximum resale price becomes more pronounced, although most economists believe that neither form of price fixing is pernicious when the supplier is neither the cat's paw of colluding distributors nor acting in concert with his competitors. A supplier acting unilaterally might fix a minimum resale price in order to induce his dealers to furnish valuable point-of-sale services (trained salesmen, clean restrooms—whatever) to customers, which they could not afford to do without a guaranteed margin to cover the costs of the services, because the customers would use the services provided by the full-service dealers but then purchase the product from a competing dealer who could sell the product at a discount because he had not borne the expense of providing the services. Lester G. Telser, "Why Should Manufacturers Want Fair Trade?"

3 *J. Law & Econ.* 86 (1962); Ippolito & Overstreet, *supra*, 39 *J. Law & Econ.* at 294 (summarizing this and other theories of benign resale price maintenance).

As for maximum resale price fixing, unless the supplier is a monopsonist he cannot squeeze his dealers' margins below a competitive level; the attempt to do so would just drive the dealers into the arms of a competing supplier. A supplier might, however, fix a maximum resale price in order to prevent his dealers from exploiting a monopoly position. We do not know anything about the competitive environment in which Khan and State Oil operate—which is why the district judge was right to conclude that if the rule of reason is applicable, Khan loses. But suppose that State Oil, perhaps to encourage the dealer services that we mentioned, has spaced its dealers sufficiently far apart to limit competition among them (or even given each of them an exclusive territory); and suppose further that Union 76 is a sufficiently distinctive and popular brand to give the dealers in it at least a modicum of monopoly power. Then State Oil might want to place a ceiling on the dealers' resale prices in order to prevent them from exploiting that monopoly power fully. It would do this not out of disinterested malice, but in its commercial self-interest. The higher the price at which gasoline is resold, the smaller the volume sold, and so the lower the profit to the supplier if the higher profit per gallon at the higher price is being snared by the dealer.

Despite these points, the Supreme Court has thus far refused to reexamine the cases in which it has held that resale price fixing is illegal per se regardless of the competitive position of the price fixer or whether the price fixed is a floor or a ceiling. The key precedent so far as the present case is concerned is *Albrecht v. Herald Company*, 390 U.S. 145 (1968), a damages suit like this where the Court held over a vigorous dissent that the action of a newspaper publisher in fixing a ceiling at which its distributors could resell the newspaper to the public was illegal per se. State Oil seeks to distinguish *Albrecht* by pointing out that the initiative for the newspaper to take

action against the plaintiff distributor had come from another distributor, giving the scheme a "horizontal" flavor. True, but this was not a factor on which the Court relied. It stated its holding broadly: maximum price fixing is illegal per se even if entirely "vertical," that is, even if the only parties in the picture are a single supplier and a single dealer, as in this case. The Court explicitly rejected the view that "contracts between a single supplier and his many dealers to fix maximum resale prices would not violate the Sherman Act." *Id.* at 152 n. 8. The only use the Court made of the involvement of the other distributor was to show that it was not a case in which the supplier, as permitted by the *Colgate* doctrine (see below), had merely cut off a dealer for failing to adhere to a suggested price. See *id.* at 149-50. It is not cricket to distinguish a precedent by pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it. Otherwise no precedents would have any force, for no two cases are exactly alike.

State Oil points out that a supplier has the right to suggest a retail price and terminate a dealer who does not adhere to it. True, *United States v. Colgate & Co.*, 250 U.S. 300 (1919), but irrelevant. In such a case there is no agreement between the parties and so no basis for invoking section 1 of the Sherman Act, which is limited to contracts, combinations, and conspiracies, all of which involve an element of agreement. There was an explicit agreement that Khan could not make money if he sold above the suggested retail price. Had he raised its price above that level, State Oil would have had a contractual right to a rebate.

State Oil's main argument is that *Albrecht* is no longer the view of the Supreme Court. (That argument was squarely rejected in *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiensgesellschaft*, 19 F.3d 745, 752-54 (1st Cir. 1994), so if we accepted State Oil's argument we would be creating a circuit split.) State Oil relies on a line of cases decided after *Albrecht* in which the Court established the concept of "antitrust injury." There is no right

to maintain a suit under the antitrust laws unless the defendant's conduct has impaired the kind of interest that the antitrust laws were intended to protect. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). And there is no such interest in the maintenance of a monopoly price. If typically and here a resale price ceiling imposed by a seller merely prevents his dealers from reaping monopoly profits, the injury to the dealers from the ceiling—the loss, that is, of monopoly profits—will not support an antitrust suit. The requirement of proving antitrust injury is not waived in per se cases. In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), the Supreme Court held that a competitor of dealers prevented by their suppliers from raising their prices could not complain that the restriction was preventing him from raising his own prices.

We have considerable sympathy with the argument that *Albrecht* is inconsistent with the cases that establish the requirement of proving antitrust injury. In fact, we think the argument is right and that it may well portend the doom of *Albrecht*. In *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 706-07 (7th Cir. 1984), we said we regarded the continued validity of *Albrecht* as an open question, albeit for a different reason: that after *Albrecht* the Supreme Court had (reversing its previous position) recognized that exclusive dealer territories may be procompetitive. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). As we pointed out earlier in this opinion, and as one of the dissenting opinions in *Albrecht* had pointed out as well, 390 U.S. at 169, a price ceiling is a natural and procompetitive incident to a scheme of territorial exclusivity. The majority opinion in *Albrecht* had rejected this argument on the ground that price fixing cannot be "justified because it blunts the pernicious consequences of another distribution practice," 390 U.S. at 154, namely exclusive territories. We now know that the consequences of that other practice are not (not generally, at any rate) pernicious. So another prop beneath *Albrecht* has been knocked away, although State Oil does not make the argument from *Sylvania*, maybe because it does not grant its dealers exclusive territories (the record is silent on the matter).

Yet despite all its infirmities, its increasingly wobbly, moth-eaten foundations (see 8 Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 1635-38 (1989)), *Albrecht* has not been *expressly* overruled (or, what would amount to the same thing, a later case, conceded to be indistinguishable, has not been expressly overruled). And the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court; we are to leave the overruling to the Court itself. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *id.* at 486 (dissenting opinion) ("indefensible brand of judicial activism"); see also *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734, 741-42 (7th Cir. 1986). *Albrecht* was unsound when decided, and is inconsistent with later decisions by the Supreme Court. It should be overruled. Someday, we expect, it will be. The Supreme Court in the *Atlantic Richfield* case was willing to assume only "*arguendo*" that *Albrecht* had been correctly decided, 495 U.S. at 335 n. 5, and it cited at length the critical academic commentary on the case. *Id.* at 343 n. 13. And in *Arizona v. Maricopa County Medical Society*, *supra*, the Court, while reaffirming the per se rule against *horizontal* maximum price fixing, noted that *Kiefer-Stewart*, unlike *Albrecht*, had been a case of horizontal maximum price fixing and that "horizontal restraints are generally less defensible than vertical restraints," 457 U.S., at 348 n. 18, though elsewhere the opinion quotes at length from *Albrecht*, and with apparent approval, a denunciation of maximum price fixing not limited to the horizontal variety. *Id.* at 347.

But all this is an aside. We have been told by our judicial superiors not to read the sibylline leaves of the *U.S. Reports* for prophetic clues to overruling. It is not our

place to overrule *Albrecht*; and *Albrecht* cannot fairly be distinguished from this case.

It might be distinguishable if there were a class of cases in which maximum price fixing, though wholly vertical, wholly unilateral, did cause antitrust injury, even if *Albrecht* and the present case were not members of that class. Then, while *Albrecht* itself might be decided differently today, its principle that such price fixing is illegal per se would have some domain of application. In that event affirmance here would construe *Albrecht* narrowly but not abrogate it. But State Oil is not able to identify any cases, real or hypothetical, in which the practice condemned in *Albrecht* could cause an injury to the interests protected by antitrust law. If proof of antitrust injury is required in cases involving the sort of price fixing involved in *Albrecht*, no such case could be brought, whether by a private plaintiff or by the Department of Justice or the Federal Trade Commission.

More to the point, the Supreme Court's conception of antitrust injury may be broader than State Oil's. The Court has never retreated from the proposition that vertical minimum price fixing (resale price maintenance) is illegal per se. See, e.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, *supra*, 485 U.S. at 725-26. Yet, under the dealer-service theory that we sketched, and other theories that have the support of antitrust economists, resale price maintenance does not impair any interest that the antitrust laws interpreted in light of modern economics could be thought intended to protect. It increases rather than reduces competition—as the Court recognized in the *Sylvania* decision, dealing with the closely related area of territorial and other nonprice restrictions placed by suppliers on competition among their dealers. Yet *Sylvania* itself reaffirms the per se rule against vertical price restrictions. 433 U.S. at 51 n. 18. The Court must think that preventing intrabrand price competition harms an interest protected by the antitrust laws even if the restriction increases competition viewed as a process for maximizing consumer welfare and even if a restriction that had

similar effects but was not an explicit regulation of price would be lawful. If this is what the Court believes—and it does appear to be the Court's current position, though not one that is easy to defend in terms of economic theory or antitrust policy—the Court may also think that interfering with the freedom of a dealer to raise prices may cause antitrust injury. We suspect not, but we cannot have sufficient confidence in our view to declare a decision of the Supreme Court that has not been expressly overruled nevertheless defunct, as we would have to do in order to agree with the district court's ruling that the maximum price provision in the contract between State Oil and Khan was not illegal per se. In *Atlantic Richfield*, despite the Court's evident skepticism about the continued soundness of *Albrecht*, the Court distinguished it on the ground that the dealers subject to a price ceiling imposed by their supplier, as distinct from their competitors, were the intended beneficiaries of *Albrecht*. See 495 U.S. at 336-37. The implication is that the injury to a dealer like Khan from not being able to raise his price because of a restriction imposed by his supplier is antitrust injury.

But even if Khan, as we believe, is not ruled out of court by the concept of antitrust injury, he had to prove injury in fact to be able to maintain the suit. The only evidence of injury was in the report of his economic expert, so if the judge did not abuse his discretion in excluding the report we must affirm the dismissal of the antitrust count even though we think he was wrong to think that *Albrecht* made it impossible for Khan to prove *antitrust* injury. But we think it was an abuse of discretion.

The judge's ground for the exclusion was that "the report turns entirely on the experience of one receiver who operated one gas station over a five-month period." Before Khan was terminated, State Oil issued a notice of termination and, on the ground that Khan was selling inventory in which State Oil retained a security interest without reimbursing State Oil, obtained from a state court an order appointing a receiver to operate the station. He did

so for five months. (The record does not reveal what happened at the end of that period. We assume that State Oil either took over the operation of the station itself or obtained another lessee.) The plaintiffs' expert obtained the receiver's financial records and determined from the cost and revenue figures in them that the receiver must have disregarded the price ceiling in the agreement with State Oil. The figures showed that the receiver had realized a margin on his sales of gasoline in excess of 3.25 cents. The only way he could have done this was by charging a price in excess of the suggested retail price and not rebating the higher margin generated by the higher price. The expert inferred that had Khan been allowed to raise his price above the suggested retail price, he would have had a higher income, enabling him to pay his rent and therefore avert termination.

Of course competitive conditions may have changed during the time the receiver was operating the station. A dealer's ability to raise his price depends on the demand for his product; the demand for gasoline in general, or for Union 76 relative to other brands, may have increased after the receiver took over. If so, his ability to maintain a price higher than the suggested retail price would not prove that Khan had had a similar ability. And if Khan could not have maintained a price above the suggested retail price, simply because competition would not have permitted him to do so, then he wasn't hurt by the contractual provision of which he complains. There would be a violation of the antitrust laws, but no injury.

But this is just to say that the evidence presented by the expert was not conclusive on the subject of injury—was, indeed, very far from being conclusive. That did not make it either inadmissible or devoid of probative value. The only ground on which it could be argued to be inadmissible would be that the expert, although a Ph.D. in economics from a reputable university and an experienced consultant in antitrust economics, and hence qualified to offer expert economic evidence in this case, had failed to conduct a study that satisfied professional norms. As we

have emphasized in cases involving scientific testimony—and the principle applies to the social sciences with the same force that it does to the natural sciences—a scientist, however reputable, is not permitted to offer evidence that he has not generated by the methods he would use in his normal academic or professional work, which is to say in work undertaken without reference to or expectation of possible use in litigation. *Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996); *Bammerlin v. Navistar Int'l Transportation Corp.*, 30 F.3d 898, 901 (7th Cir. 1994). The district judge identified no basis, and State Oil can point to none, for supposing that the expert's report flunked this test. The inference regarding the receiver's profit margin, drawn from the station's cost and revenue data, was straightforward, and, so far as appears, was made in just the way that an economist interested in a firm's profit margins for reasons unrelated to litigation would make it; and likewise the inference that if Khan had enjoyed the freedom that the receiver evidently thought *he* had he would have charged a higher price, and made more money, than he did. If anything, the economist was overqualified to give evidence that could as easily have been given by an accountant; but overqualification is not yet a recognized basis for disqualification.

Weight is different from admissibility. An expert's report might be admissible but so lacking in weight as not to block the granting of summary judgment for the other side. *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1338-39 (7th Cir. 1989); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993). But that is not the situation here. State Oil put in no evidence. In the absence of contrary evidence, Dr. Bamberger's inference from his study of the receiver's experience that Khan had been hurt by the maximum price provision of the gasoline supply contract was sufficiently plausible to defeat summary judgment on the question of injury.

The antitrust claim should not have been dismissed. We turn to the breach of contract claim. Although Khan's primary complaint is that he was prevented from raising his price, he also complains that there were times when he wanted to lower his price on nonpremium gasoline. As we said at the outset, this claim has no standing as an antitrust claim. But State Oil concedes that its contract implicitly obligated it to suggest retail prices (and adjust its wholesale prices accordingly, to maintain the 3.25 cents margin between wholesale and suggested retail price that the contract guarantees) that were realistic in light of competitive conditions facing Khan. The only evidence Khan presented concerning those competitive conditions was evidence that on sixteen occasions during his operation of the station he had called other dealers and been told that their retail prices were lower than the suggested retail prices fixed by State Oil. This evidence falls far short of establishing a genuine issue of material fact concerning a breach of the contract. There is no evidence that the dealers were actual competitors of Khan or that the prices charged by those dealers were prices for the same grades of gasoline sold by Khan, which, remember, sold a gasoline that has a well-recognized brand name. The evidence is perfectly consistent with an assumption that State Oil's suggested retail prices were competitively realistic.

So the contract claim was rightly dismissed but we note the absence from the record of any indication of why the district judge, having dismissed the federal claims before trial, retained rather than, as is the norm in such situations, relinquished jurisdiction over the supplemental state-law claim. 28 U.S.C. § 1367(c)(3); *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993). (It does not appear that there is diversity of citizenship between the parties.) The presumption in favor of relinquishment when all federal claims fall out before trial is rebuttable, *id.*, but it should not be lightly abandoned, as it is based on a legitimate and substantial concern with minimizing federal intrusion into areas of purely state law.

Since the absence of merit of the supplemental claim in this case is clear as a matter of elementary contractual interpretation, so that the retention of jurisdiction for purposes of dismissing the claim did not require the district judge to speculate about the meaning of state law, we think the judge was right to retain jurisdiction rather than visit upon the parties and the state courts the burden of further litigation. As we said in *Brazinski*, citing a slew of earlier cases, if the correct disposition of the supplemental claim is so clear as a matter of state law that it can be determined without a trial and without entanglement in difficult issues of state law, considerations of judicial economy counsel retention and prompt decision, rather than remission to the state court. *Id.* But we remind the district courts of the presumption against retaining jurisdiction of supplemental state-law claims when the federal claims are dismissed before trial, and of the concomitant importance of stating the ground on which the court believes in a particular case that the presumption has been rebutted.

The judgment of the district court is affirmed in part and reversed in part, as explained in the opinion, and the case is remanded for further proceedings consistent with the opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

RIPPLE, *Circuit Judge*, concurring. Today the court employs a rigorous application of the rules of stare decisis and precedent in this antitrust matter. This methodology is certainly, as a general proposition, a prudent approach to antitrust decision-making in the judicial context. Antitrust issues pose crucial policy choices for the economic and, indeed, social life of the Country. Nevertheless, Congress, content with the passage of generally worded statutes, has left a great deal of policy-making to the courts through the process of case by case decision-making. In these circumstances, we ought to ensure, through the strict application of stare decisis and precedent, that the law is sufficiently predictable and certain to permit businesses to order their affairs with a clear understanding of what the law requires. I agree, therefore, with the basic methodology employed by the court in reaching the decision announced today. I write separately to note that I share my colleagues' substantive criticism of the per se rule as it has been applied to vertical maximum price-fixing and to question the extension of that rule to cases like the present one in which the threat of horizontal cartelization is absent or, at the very least, greatly diminished. It is difficult to discern the "manifestly anticompetitive effect," *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977), that justifies invocation of the per se rule.

The Supreme Court first applied the per se rule to vertical maximum price-fixing in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The defendant in that case, a newspaper publisher, set a suggested retail price for its many distributors. When one of the distributors sought to charge his customers more than the suggested price, the publisher attempted to discipline him by hiring another entity to assume some of the business handled by the recalcitrant carrier. The Supreme Court held that this restraint was unlawful per se under section 1 of the Sherman Act because, as the Court later recounted in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1989), the restraint "threatened to inhibit vigorous [price] competition by the

dealers who were bound by it" and because it "threatened to become a minimum price-fixing scheme." *Id.* at 335.[1]

The present case arises in a factual context that is far removed from the one at issue in *Albrecht*. This case, as presented to the district court and to this court on appeal,[2] involves a single contract between a single wholesaler and a single retailer that sets the equivalent of maximum resale price for the commodity in question. Neither the pleadings in this case nor the contract between Khan and State Oil implicate any other entities. We are confronted, therefore, with a wholly vertical arrangement; there is no hint of any concrete horizontal effect.

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[1] Although the Court in *Atlantic Richfield* referred to the situation in *Albrecht* as an "unadulterated vertical, maximum-price-fixing arrangement," *Atlantic Richfield*, 495 U.S. at 336 n.6, the harm identified in *Albrecht* was largely horizontal and stemmed from the fact that multiple dealers were subject to the restraint. At issue was "the manner in which [the arrangement] might restrain competition by dealers." *Id.* at 335.

[2] We note that Khan's complaint does contain the following allegation:

> At all times relevant to this action Defendant has been engaged in the business of leasing service stations/convenience stores such as that operated by Plaintiffs, as well as in the sale of petroleum and other products to such service stations for resale to the public under the "Union 76" trademark. Plaintiffs are informed and believe that Defendant is involved in the lease and/or operation of numerous other service stations in the Chicago Metropolitan Area.

R.1, Complaint, at ¶ 7. Although the final sentence of this paragraph arguably alleges the existence of other State Oil dealers, it is clear from the record in this case that Khan did not present the case to the district court on this theory. The summary judgment record is devoid of any evidence suggesting that other State Oil dealers also are subject to the price restraint challenged by Khan. Because the case was not presented to the district court on the theory that the restraint had been imposed by multiple wholesalers or upon multiple dealers, we do not view this unsupported allegation in Khan's complaint as sufficient to make this case factually analogous to *Albrecht*.

In *Center Video Industrial Co., Inc. v. United Media, Inc.*, 995 F.2d 735 (7th Cir. 1992), we discussed the centrality of the presence or absence of horizontal effects in determining whether a particular vertical restraint ought to be prohibited by the antitrust laws. Reviewing existing Supreme Court precedent addressing vertical restraints, we noted that, in the Supreme Court's view, "only one legitimate justification exist[s] for prohibiting vertical price restraints imposed by manufacturers who lack significant market power: a proved tendency for such agreements to facilitate the formation of horizontal cartels." *Id.* at 737. We addressed in *Center Video* the "two mechanisms" by which a vertical price maintenance agreement might be used to facilitate the formation of horizontal cartels. *Id.* First, we explained, vertical price maintenance arrangements facilitate cartelization at the retail level; the restraint provides a mechanism by which conspiring dealers are able to enforce the agreement against wayward members of the horizontal conspiracy. *See id.* at 737. We further noted that vertical price maintenance agreements may also assist in the formation of cartels at the manufacturer level. By requiring prospective members of a manufacturer cartel to impose price restraints on their dealers, cartel members have an effective method of determining whether their partners are abiding by the rules of the cartel. "The members of the cartel then need only monitor the retail prices of their partners' distributors, secure in the knowledge that any deviation from a given retail price would indicate that a member of the cartel had broken ranks . . . ." *Id.* at 738. In the absence of any allegation that the restraint at issue in this case was imposed by multiple manufacturers or upon multiple dealers, neither of these two justifications for application of the per se rule applies.

As my colleagues recognize, the anticompetitive implications of vertical price restraints are often difficult to discern. The difficulty in discovering actual injury to competition—or even the potential for such injury—is compounded where, as here, the price restraint in question is wholly vertical in nature and has been imposed by a

single wholesaler upon a single distributor. It simply is not clear that the plaintiff can show an "injury of the type that the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Like my colleagues, therefore, I have serious doubts as to the continued viability of *Albrecht*—especially in the context of conduct that is devoid of horizontal anticompetitive implications. Our application of the per se rule to this limited restraint therefore marks a considerable extension of the *Albrecht* rule beyond the facts presented in that case.

Nevertheless, until the Supreme Court limits the use of the per se rule with respect to vertical price restraints, I am unable to rule out the possibility that the Justices might intend the per se rule to be broad enough to reach State Oil's conduct. Arguably, its action might be viewed as implicating some of the concerns articulated in *Albrecht*. For example, the Supreme Court in *Albrecht* explained that "[m]aximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." 390 U.S. at 153. By eliminating any motive for Khan to increase his prices above the suggested retail price, State Oil effectively may have relegated Khan to the discount gasoline market. *See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 753-54 (1st Cir. 1994) (noting that, because the plaintiff dealer was forced to keep its price below the level it preferred to set, the challenged agreement forced the plaintiff to provide less of what customers wanted, leading to potentially lower profits). One less potential entrant in the full-service gasoline market means that dealers that market are able to charge a higher price for the same package of services. *See Albrecht*, 390 U.S. at 152 (noting that a vertical maximum-price agreement, "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market").

The Supreme Court also noted in *Albrecht* that, by limiting the ability of small dealers to engage in nonprice competition, a maximum price-fixing agreement might "channel distribution through a few large or specially advantaged dealers." *Id.* Here, the net effect of the restraint imposed on Khan by State Oil is to limit Khan's margin to $0.325 per gallon—a margin which, in Khan's view, is unrealistically low. Over the long run, high-volume gasoline dealers, who are able to maintain low margins for longer periods of time, might benefit from the arrangement foisted on Khan by State Oil.

At some point in the future, the Supreme Court may revisit *Albrecht* and further define the scope of the per se rule in the context of vertical maximum price-fixing. Until that time, however, we cannot be sure whether the rule of *Albrecht* is broader than the facts which gave it birth. In the interim, considerations of stare decisis and precedent require us to continue to adhere to the per se rule against vertical maximum price-fixing in cases in which identifiable anticompetitive effects are present. Although the absence of concrete horizontal implications makes this a considerably closer case, State Oil's conduct does present, for the reasons outlined above and in the majority's opinion, at least the possibility of the anticompetitive effects identified by the Supreme Court in *Albrecht*. On this ground, therefore, I concur in the court's decision.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 29, 1996
BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge

No. 96-1309

BARKAT U. KHAN and KHAN & ASSOCIATES, INC., an Illinois corporation,

Plaintiffs-Appellants

v.

STATE OIL COMPANY, a corporation,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 94 C 35—Charles R. Norgle, Judge

The judgment of the District Court is AFFIRMED in part and REVERSED in part, and the case is REMANDED in accordance with the decision of this court entered on this date. Costs are awarded to the appellant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 94 C 35 Date: October 3, 1995

Name of Assigned Judge: CHARLES R. NORGLE

Case Title: BARKAT U. KHAN and KHAN & ASSOC., INC. v. STATE OIL CO.

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DOCKET ENTRY:

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/s/ Charles R. Norgle, Sr.

(10) ☒ [Other docket entry]

In Document # 68, the court struck Documents # 41-1, 45-1, 51-1, 59-1 and 60-1 with leave to reinstate should settlement negotiations fail. (Doc. # 68.) Settlement negotiations failed. The clerk shall reinstate the following: Defendant's motion for summary judgment (Doc. # 41-1); Plaintiff's motion for summary judgment (Doc. # 45-1); Defendant's motion to strike (Doc. # 51-1); Defendant's motion to bar the testimony of Gustavo E. Banberger (Doc. # 59-1); Defendant's motion in limine with respect to the expert testimony of Gustavo E. Bamberger (Doc. # 60-1).

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 94 C 35 Date: October 3, 1995

Name of Assigned Judge: CHARLES R. NORGLE

Case Title: BARKAT U. KHAN and KHAN & ASSOC., INC. v. STATE OIL CO.

* * * * *

DOCKET ENTRY:

* * * * *

/s/ Charles R. Norgle, Sr.

(10) ☒ [Other docket entry]

Plaintiffs' Motion for Reconsideration (received September 22, 1995) is denied. Plaintiff's Motion for Certification for Appeal of the court's minute order (Doc. #73) is granted pursuant to 28 U.S.C. § 1292(b). Pursuant to Federal Rule of Appellate Procedure 5(a), the minute order is amended to include the following statement: "The court finds that the issue addressed in this minute order (Doc. #73) 'involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.' 28 U.S.C. § 1292(b)." Fed. R. App. P. 5(a).

* * * * *

[Dated November 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BARKAT U. KHAN and KHAN & ASSOCIATES, INC., an Illinois corporation,	)	
Plaintiffs,	)	No. 94 C 35
v.	)	Honorable Charles R. Norgle
STATE OIL COMPANY, a corporation,	)	
Defendant.	)	

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court are the parties' cress-motions for summary judgment on Count II, and Defendant State Oil Company's ("State Oil") motion for summary judgment on Counts I and IV. Also before the court are State Oil's motion to strike Plaintiff's expert report, its motion to bar that expert's testimony, and its motion in limine regarding that expert's testimony. Plaintiff has indicated that he will voluntarily dismiss Count III.

I. BACKGROUND

Plaintiffs Barkat U. Khan ("Kahn") and Khan & Associates, Inc. ("K&A") (collectively "Plaintiffs") bring this action against State Oil claiming damages for violations

of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-41 (Count I), the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. § 1 (Count II), and for breach of contract (Count IV). The court exercises jurisdiction over the PMPA and Sherman Act claims pursuant to 28 U.S.C. § 1331 and over the contract claim under its supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

On January 20, 1992, Khan and State Oil Entered a written lease and supply agreement ("Agreement") regarding a gasoline service station (the "Station"). In relevant part, paragraph 31 of the Agreement provides:

> In order to assist in maintaining the competitive position of both Landlord and Tenant,The [sic] Landlord will from time to time establish a recommended retail pump price for each type of gasoline sold at the location. The Landlord shall charge the Tenant for each transport of gasoline at the recommended retail pump price less margin and sales tax. The Tenant's margin will be $0.0325 (three and 1/4 cents) per gallon. In the event the Tenant elects to sell at retail at a price in excess of the recommended retail pump price established by the Landlord, the Tenant shall pay the Landlord a sum equal to the difference between the retail pump price at which the gasoline in question has been sold, and the recommended retail pump price established by the Landlord multiplied by the number of gallons sold. In the event the Tenant elects to sell at a retail pump price below the recommended retail pump price established by the Landlord, the Tenant shall not be entitled to a reduction in price to cover the difference.

The Agreement also provides for rent in the amount of $7,500 per month in 1992, $8,000 per month in 1993, and $8,500 per month in 1994.

After execution of the agreement, Khan took possession of the Station and remained in possession from January 1992 to February 1993. During that time, pursuant to the Agreement, Plaintiffs purchased from State Oil and resold various grades of gasoline. Both parties agree that Khan was a franchisee and State Oil was a franchisor under the definitional provisions of the PMPA.

On January 27, 1993, State Oil issued a Notice of Termination, giving Plaintiffs five-days notice of State Oil's intent to terminate the Agreement as of February 2, 1993. State Oil explains that this notice was issued for non-payment of amounts owed. On February 8, 1993, State Oil brought a forcible entry and detainer action in DuPage County and a separate action to collect on the debt. The Circuit Court of the Eighteenth Judicial Circuit of Illinois appointed a receiver to operate the Station.

Khan removed State Oil's action to federal court, arguing that the PMPA applied. On May 12, 1993, the court denied State Oil's motion for summary judgment, because the court had not determined that, as a matter of law, State Oil's January 27, 1993 notice was reasonable. The court found that it did not have jurisdiction over State Oil as a plaintiff franchisor under the PMPA because the PMPA grants jurisdiction only over franchisee actions. *State Oil Co. v. Khan*, 839 F. Supp. 543 (N.D. Ill. 1993). By order of December 3, 1993, this court remanded the action back to DuPage County. In addition to the instant case in federal court, Khan filed state counterclaims and a third-party complaint in the remanded state collection action.

After the state court appointment of the receiver, State Oil issued a second notice of termination on May 29,

1993, providing for termination effective September 3, 1993. The receiver ran the Station from February until November 1993.

II. DISCUSSION

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c); *Transportation Communications Int'l Union v. CSX Transp., Inc.*, 30 F.3d 903, 904 (7th Cir. 1994). The court evaluates all evidence in the light most favorable to the non-movants. *Serfecz v. Jewel Food Stores*, No. 94-3211, 1995 WL 567135, at *3 (September 26, 1995). To withstand summary judgment, disputed facts in a case must be those that might affect the outcome of the suit. *Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994). Summary Judgment is not a discretionary remedy and must be granted when the movant is entitled to it as a matter of law. *Anderson v. P.A. Radocy & Sons, Inc.*, No. 93-287, 1995 WL 572914, at *2 (7th Cir. Sept. 29, 1995). In the instant case, considering all facts in the light most favorable to the non-movants, there are no genuine issues of material fact which would allow this case to withstand summary judgment.

A. *K&A as a Party*

As a preliminary matter, State Oil contends that K&A is not a proper plaintiff in this action because the Com-

plaint alleges a contractual relationship only between Khan and State Oil. The PMPA offers protections only to a "franchisee," which is defined as "a retailer or a distributor . . . who is authorized . . . under a franchise . . . to use a trademark in connection with the sale . . . or distribution of motor fuel." 15 U.S.C. § 2801(4). The PMPA defines a "franchise" only in terms of a contractual relationship. 15 U.S.C. § 2801(1)(B). Khan was the only "retailer or distributor" in a contractual relationship with State Oil. Because K&A was not engaged in a contractual relationship with State Oil, it is not a protected "franchisee" under the PMPA. Thus, it is not a proper plaintiff under Count I of the Complaint.

Count II of the Complaint alleges a violation of antitrust law. State Oil contends that K&A does not have standing to bring this count because there was no contractual relationship between State Oil and K&A. Because antitrust law is designed to prevent many types of injuries, rather than simply contractual injury, courts should generally focus on antitrust injury requirements, rather than traditional contractual standing requirements, when deciding antitrust cases. *See Southwest Suburban Bd. of Realtors v. Beverly Area Planning Assoc.*, 830 F.2d 1374, 1377 n.1 (7th Cir. 1987). Because K&A may have been in a position to suffer potential antitrust injury, the court will not dismiss K&A's Count II, and will consider that count as it applies to both Khan and K&A.

Count IV alleges a state law contract claim. Again, because State Oil incurred no contractual duties to K&A under the facts presented, K&A does not have standing to bring this contractual claim against State Oil. *See*

White Hen Pantry, Inc. v. Cha, 214 Ill. App. 3d 627 (1991).

In sum, K&A does not have standing to bring Counts I and IV. As such, the court considers Counts I and IV as if they were brought by Khan individually.

B. *Petroleum Marketing Practices Act*

Khan alleges that State Oil violated the PMPA by its defective January 27, 1993, notice of intent to terminate the Agreement and by its action to appoint the receiver.[1] The court need not decide whether the January 27 notice was faulty for purposes of this order.[2]

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[1] Citing *Winks v. Feeney Oil Co.*, 731 F. Supp. 322, 327 (C.D. Ill. 1990), Khan asserts that State Oil has already conceded that its first notice was defective by issuing the second notice. The court respectfully disagrees with the *Winks* court. The court will not imply that a franchisor concedes a defective first notice when it issues a complying second notice. By punishing the issuance of a correct notice, the incentive for franchisors' to correct possible defective notices would be removed.

[2] Khan's response to State Oil's motion states:

> In the action before Judge Norgle prior to its remand, State Oil moved for summary judgment, which was denied by Order dated May 12, 1993. Judge Norgle found that the January 27, 1993 Notice of Termination . . . was not reasonable nor justified under the circumstances.

(Pls.' Mem. In Opp'n to Summ. J. at 4.) Khan seems to ignore the court's later opinion and order remanding the case to the Circuit Court of DuPage County, which explains:

> [T]he court has *not* already made a finding that State Oil's original notice of termination was defective or unreasonable. The court in its May 12, 1993 minute order on State Oil's motion for summary judgment found only that State

(continued...)

The PMPA provides franchisees the right to pursue equitable and legal actions against franchisors who fail to comply with the PMPA's notice provisions in terminating franchisees. 15 U.S.C. § 2805. The preliminary issue in a PMPA wrongful termination action is whether there was a termination. This issue arises from the requirement that a court's jurisdiction be secured by a justiciable case or controversy. *Naso v. Sun Ref. Mktg. Co.*, 582 F. Supp. 1566 (N.D. Ohio 1983) (citing *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945)). The PMPA vest jurisdiction in federal district courts over matters involving the violation of 15 U.S.C. § 2802 (a), which states:

> [N]o franchisor engaged in the sale . . . or distribution of motor fuel in commerce may - (1) terminate any franchise . . . prior to the conclusion of the term, or the expiration date, stated in the franchise; or . . . (2) fail to renew any franchise relationship.

15 U.S.C. § 2802(a).

Khan alleges that the appointment of the receiver was a termination by State Oil pursuant to the January 27 notice. This court has already determined, in its minute order of September 11, 1995, that it will not construe the appointment of a receiver by the state court as a termi-

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[2] (...continued)

> Oil failed to convince the court that providing ninety-days notice would not have been reasonable as a matter of law. The court did not conclude the opposite: that ninety-days notice would not have been unreasonable, or that the five-day notice was itself unreasonable. That issue may thus be revisited. *State Oil v. Kahn*, 839 F.Supp. 543, 544 n.1 (N.D. Ill. 1993) (Norgle, J.) (emphasis added).

nation by State Oil under the PMPA.[3] The appointment was an action of the state court, rather than an action of State Oil. As such, that appointment cannot be viewed as a termination by State Oil flowing from its arguably-defective January 27 notice. Khan has not alleged any other act which could constitute a termination by State Oil in violation of the PMPA. Khan's failure to meet this jurisdictional requirement raises a serious doubt about the existence of a justiciable case or controversy. *See Halder v. Standard Oil Co.*, 642 F.2d 107 (5th Cir. 1981) (franchisee's fear of termination did not confer jurisdiction on the district court).

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[3] In part, the court's order states as follows:

> As a matter of law, the mere appointment of a receiver by the Circuit Court for the 18th Judicial Circuit did not constitute a termination of the contract between the parties. Generally, appointment of a receiver does not determine the rights of the parties. Rather, a receiver acts as an officer of the court, managing the property for the benefit of both parties. *First Nat'l Bank of Vandalia v. Trail Ridge Farm*, 143 Ill. App. 3d 244, 251 (5th Dist. 1986); *see also People ex rel. Scott v. Pintozzi*, 50 Ill. 2d 115 (1971); *In re marriage of Pick*, 167 Ill. App. 3d 294, 299 (2d Dist. 1988) (purpose of receivership is to prevent injury and avoid injustice).
>
> The decision to appoint a receiver lies within the discretion of the court. *Asset Guar. Reinsurance Co. v. American Nat'l Bank & Trust Co. Of Chicago*, 627 N.E.2d 179 (Ill. App. 1st Dist. 1993). State Oil's mere petition for a receiver could not have served as a termination of the agreement. Rather it was the court's discretionary decision that placed Plaintiff's property in receivership. The court's appointment of a receiver was not a termination of the franchise agreement by State Oil. September 11, 1995 (Doc. # 72).

Alternatively, Khan argues that he did not need to wait for State Oil to actually terminate his franchise before bringing a PMPA action against State Oil. Khan cites several cases where franchisees brought actions based on defective notices prior to actual termination. *See, e.g., Winks v. Feeney Oil Co., Inc.*, 731 F. Supp. 322 (C.D. Ill. 1990); *Thompson v. Kerr-McGee Refining Corp.*, 660 F.2d 1380 (10th Cir. 1981). However, these cases involve franchisees who were, unlike Khan, seeking injunctions against termination.

Nevertheless, Khan's argument is that the January 27 notice alone is enough to entitle him to damages. He contends that courts must not allow franchisors, like State Oil, to escape liability for harm caused by defective notices by later withdrawing those notices. Khan cites no authority for this proposition.

Furthermore, Khan does not allege that he was harmed by the January 27 notice. He alleges none of the injuries which PMPA plaintiffs in other cases have alleged. For example, as discussed above, he can not claim that an actual termination resulted from that notice. Also, because he did not bring a claim for injunctive relief, he cannot claim attorneys fees for seeking an injunction like the plaintiffs in *Winks* and *Lyons v. Mobile Oil Corp.*, 554 F. Supp. 199 (D. Conn. 1982). He does not claim resulting lost profits like the plaintiff in *Lippo v. Mobil Oil Corp.*, 776 F.2d 706 (7th Cir. 1985). Indeed, Khan claims in Count II that the receiver increased revenue and profits while operating Khan's franchise after the time of the defective notice.

In essence, Khan's argument amounts to an assertion that the issuance of any defective notice is a *per se* violation of the PMPA entitling a franchisee to trial and damages. Neither case law nor the PMPA recognize a *per se* violation of the PMPA by franchisors entitling franchisees to recovery. This court is unwilling to create such a violation of the PMPA based on allegations of a defective notice. A mere defective notice, without more, does not form a sufficient basis for an action under the PMPA.[4] Even viewing the facts in the light most favorable to Khan, there is no genuine issue of material fact which would allow Count I (PMPA) to survive summary judgment.

C. *Antitrust*

Both sides have moved for summary judgment on Count II.[5] Plaintiffs state that the pricing provisions in

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[4] The PMPA specifically provides that the court, rather than a jury, shall determine whether exemplary damages or attorney fees should be awarded. 15 U.S.C. § 2805 (d) (2)-(3). No case or statute recognizes a mere defective notice, without alleged injury, as a violation entitling a plaintiff to fees or exemplary damages. Accordingly, Khan has set forth no facts which could give rise to such an award.

[5] As a precursor to its antitrust discussion, the court notes the ambiguity of much of the current antitrust case law:

> [T]he courts . . . [have] . . . spawned an enormous body of interpretations and judgements without great uniformity or consistency. Almost any term in a contract that was alleged in one decisions to be . . . "anticompetitive," and thus illegal, has been found in another decision to be legal.

Armen A. Alchian & William R. Allen, *Exchange and Production: Competition, Coordination & Control* 272 (3d ed. 1983). The standards of summary judgment loom heavily in

(continued...)

the Agreement (set forth above) constituted verticial price-fixing, in that the Agreement prohibited Plaintiffs from increasing income by raising or lowering State Oil's recommended retail price.[6] Plaintiffs claim that, absent the Agreement's price constraints, Plaintiffs could have increased income by raising the price of premium grade gasoline and lowering the price of regular grades.

As proof of these assertions, Plaintiffs offer the report of Gustavo E. Bamberger ("Bamberger"). Plaintiffs aver that the receiver did not follow State Oil's recommended retail price and, therefore, that the receiver increased sales of gasoline. Plaintiffs also state that increased sales of gasoline would have resulted in a similar increase in ancillary sales.

In response, State Oil states that competition, rather than State Oil, prevented Plaintiffs from raising prices. State Oil notes that Plaintiffs were free to set any price they wished for the gasoline, although profits would be effected by setting a price different from the recommended price. State Oil also argues that Plaintiffs and their expert are merely speculating about the receiver's pricing methods and success, and that any success that the receiver may have had is not an indicator that Plaintiffs

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[5] (...continued)

the face of this ambiguity. The court acknowledges the challenge of demonstrating a genuine issue of material fact under such circumstances.

[6] Vertical price-fixing involves an agreement to set retail prices between a retailer and a wholesaler, as opposed to an agreement between two wholesalers or two retailers (horizontal price-fixing). *See Black's Law Dictionary* 1400 (5th ed. 1979).

could have performed similarly. In addition, State Oil asserts that Plaintiffs' reasoning regarding the relationship between ancillary sales and gasoline is faulty.

Plaintiffs respond that State Oil's recommended prices were not competitive. Plaintiffs draws this conclusion from a series of documented phone calls, in which Khan called-in the pump prices of his competitors. For each of these phone calls, Khan's recommended prices were higher than his competition's. In response, State Oil claims that Khan only called-in prices when he wished to request a wholesale price-reduction, and that Khan's documented prices are not generally representative of the relationship between Khan's prices and those of his competition.

Section One of the Sherman Act bans "[e]very contract . . . in restraint of trade or commerce." 15 U.S.C. § 1. Section One determinaticns proceed under one of two methods: "per se" or "rule of reason" analysis. The court already ruled, on September 12, 1995 (Doc. # 73), that the alleged violation must be considered under "rule of reason," and not "per se," analysis. That is, the court will weigh all circumstances of the case when determining whether the pricing provision is illegal for imposing an unreasonable restraint on trade. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).[7]

To have standing in federal court pursuant to Article III of the Constitution, plaintiffs must demonstrate the

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[7] Under the "per se" analysis, a violative provision is one which makes "the likelihood of anti-competitive conduct so great as to render unjustified further examination of the alleged conduct." *Business Elecs. Cop. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (citation omitted).

existence of a case or controversy. *Slowiak v. Lank O'Lakes, Inc.*, 987 F.2d 1293, 1296 (7th Cir. 1993). In the antitrust context, a core component of the case or controversy demonstration is the requirement of an antitrust injury. *Serfecz v. Jewel Food Stores*, No. 94-3211, 1995 WL 567135 (7th Cir. Sept. 26, 1995). An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and . . . [an injury flowing] . . . from that which makes defendants' acts unlawful." *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989) (quoting *NCAA v. Bd. of Regents for the Univ. of Okla.*, 468 U.S. 85, 103 (1984)). The alleged injury must be palpable and distinct, rather than abstract, conjectural, or hypothetical. *Slowiak*, 987 F.2d at 1296. In considering the injury requirements of § 1 antitrust cases, although the court must draw all inferences from the underlying facts in the light most favorable to the non-movants, "antitrust law limits the range of permissible inferences from ambiguous evidence in a [§] 1 case." *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660 (1987) (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357 (1986)).

It is well-established that, in order to prove an agreement in restraint of trade, a plaintiff must show that the defendant's conduct actually had an adverse effect on all of competition in a relevant market. *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1283 (7th Cir. 1983). Proof of harm to single competitor is insufficient. *Okansen v. Page Mem. Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991).

The plaintiff has the burden of demonstrating the relevant geographic market. *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, No. 93 C 5578 1995 WL 529601, at

*31 (N.D. Ill. Aug. 8, 1995). That market is the geographic area in which a buyer may practically proceed to other sellers for goods or services, should the defendant seek to raise its prices. *Cogan v. Hargord Mem. Hosp.*, 843 F. Supp. 1013 (D. Md. 1994).

Furthermore, Rule of Reason analysis includes the general requirement that antitrust plaintiffs establish that the defendants had market power. *Valley Liquor*, 822 F.2d at 665 (7th Cir. 1987). That is, there must be a showing that defendants possessed the "power to raise prices significantly above the competitive level without losing all of one's business." *Id.*

Plaintiffs cannot meet their burden of showing an antitrust injury simply by alleging that they could have made more money by pricing products differently than they chose to. *See Slowiak*, 987 F.2d 1297-98. Instead, they must make some showing that the pricing provision caused them to lose money by forcing them to set prices which were artificial. *Slowiak* 987 F.2d 1297.

Courts must not trivialize the power of the Sherman Act by bestowing an aura of federal antitrust significance upon minor business disputes. Before receiving antitrust relief, plaintiffs must meet their burden of demonstrating the applicability of antitrust law to their dispute. Plaintiffs here have failed to demonstrate antitrust injury, harm to competition, a relevant market for analysis and market power. Accordingly, as a matter of law, Plaintiffs' allegations do not command the forces of the Sherman Act.

Plaintiffs have not even shown that they could prove that a difference in pricing would have increased their sales. Plaintiffs present the court with Bamberger's re-

port as support for their allegations that the pricing provisions of the Agreement caused the loss of the Station. Bamberger concludes that Plaintiffs would have increased their gross dollar margin if they had not followed State Oil's recommended retail price. He bases this conclusion on the undocumented assumption that the receiver did not follow the pricing provisions of the Agreement. State Oil denies that assumption. Bamberger states that the receiver showed an increase in profit and sales, which State Oil also denies. Bamberger's report also relies on a series of mathematical equations which rest on undocumented factual assumptions.

In addition, in drawing his conclusions, Bamberger notes, "The difference in . . . sales also may reflect, in part, changes in general economic conditions," although Bamberger states that he was able to isolate the effects of such changes from his calculations. (Rept. Of Gustavo E. Bamberger at 3.) He states that he isolated these effects by "assuming that absent the change in pricing policy, gallon sales at Plaintiffs' former location would have changed by the same percentage amount as total gasoline sales" in all of DuPage County. [Rept. Of Gustavo E. Bamberger at 4.] Bamberger's report makes no mention of why DuPage County is a relevant market for the analysis of Plaintiff's potential sales.

Moreover, Bamberger's report works on the unstated and unexplained assumption that five-months of the receiver's experience at a single station is a legitimate basis for analyzing Plaintiffs' experience at the same station prior to the receiver's appointment. He assumes that the receiver operated the Station in the same manner and competitive conditions as Plaintiffs. As an example of how the receiver operated the Station in the same

manner as Plaintiffs, Bamberger mentions only that the receiver and Plaintiffs followed the same hours of operation.

In an antitrust trial, the court would not admit Bamberger's report as evidence of antitrust injury. The report turns entirely on the experience of one receiver who operated one gas station over a five-month period which occurred after the alleged antitrust violation. The court would expect an expert to also consider trustworthy data reflecting the experience of other, similarly situated stations in a demonstrably relevant market. Bamberger has not done so.

From the assumption that the receiver made money while not following the pricing provisions, Bamberger draws the conclusion that Plaintiffs lost money while following the price provisions because of those provisions. The receiver's experience is not a sufficient basis for proving antitrust damages simply because the receiver's experience followed Plaintiffs'. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987) (when antitrust plaintiff attempted to prove lost profits by comparing profits for years before and after alleged unlawful activity, the court explained that *post hoc ergo propter hoc* is an invalid methodology for calculating damages, especially where other causal factors may have been at work); *See also Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 415 (7th Cir. 1992).

Furthermore, antitrust plaintiffs have the burden of showing a violation by a party with market power, *Valley Liquor*, 822 F.2d at 665, and that the violation had a negative effect on competition in the entire relevant market, not just to an individual competitor. *Tunis Bros.*

Co. Inc. v. Ford Motor Corp., 952 F.2d 715 (3d Cir. 1991); *see also GTE Sylvania*, 433 U.S. at 52. To hold otherwise would transform ordinary business disputes into antitrust claims. *See Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986). In the instant case, Plaintiffs have not even attempted to demonstrate that State Oil had market power, or to demonstrate the effect of the pricing provisions on competition in a relevant market. Plaintiffs have, at most, shown a contractual injury to single competitor in an undefined market.

Bamberger's report does not even demonstrate that Plaintiffs would not have suffered but for the alleged antitrust violation, much less that the injury was of the sort of harm that antitrust laws were intended to prohibit. *See Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 707 (7th Cir. 1984) (holding that, even if a manufacturer engaged in price-fixing, its dealer, alleging only its own lost sales, could not bring an action for antitrust damages because antitrust laws were intended to prohibit damage to market competition rather than in individual business relationships). Thus, Plaintiffs have not submitted evidence of an antitrust injury.

Accordingly, Plaintiffs fail to meet the standing requirements of Sherman Act and lack antitrust standing. As a matter of law, considering all facts in favor of Plaintiffs, there is no genuine issue of material fact for trial.

D. *State Law Contract*

Finally, Khan argues that State Oil breached a covenant of good faith and fair dealing, which arose from the Agreement, because Khan was unable to change gasoline

prices at will while State Oil did not set its prices fairly to allow Khan to make a profit. Khan states that State Oil's wholesale gasoline prices were not competitive, in violation of the covenant of good faith.

For purposes of this motion, State Oil concedes that it did have an obligation under the Agreement to set a competitive recommended pump price. Therefore, State Oil agrees with Khan that State Oil would be in violation of that obligation if it set a recommended pump price (which was linked to the wholesale price) which was too high to be competitive. However, State Oil notes that, a low, and thus competitive, recommended pump price (linked to a low wholesale price) would not be in violation of its obligation. The court agrees. *See Atlantic Richfield*, 495 U.S. at 399 (low, non-predatory, prices are not anti-competitive). Khan can therefore only recover for breach of the covenant if he can present facts indicating that State's prices were too high to be competitive.

State Oil argues that Khan has presented no such facts. State Oil asserts that Bamberger's report consists of mere speculation, without supporting economic analysis.

Khan asserts that he need not establish that State Oil's prices were too high. Rather, he believes that he need only prove that State Oil breached its covenant of good faith. According to Khan,

> [The breach] . . . is amply shown by the fact that the Agreement itself is *per se* illegal under . . . the Sherman Act. The Agreement was thus void *ab initio*, and it necessarily follows that State Oil, by drafting, entering into, and enforcing the illegal pricing provisions, breached its covenant of good faith to Khan.

(Pls.' Mem.' in Opp. To Summ. J. at 20.) In sum, Khan argues that State Oil is liable for a breach of a void, unenforceable covenant.

In addition to this circular argument, Khan proceeds to defend Bamberger's report, arguing that it does demonstrate the anti-competitive nature of State Oil's pricing scheme. As discussed above, the court finds that the report rests on undocumented and unexplained assumptions which fail to demonstrate any anti-competitive injury. Consequently, Khan has offered no facts to support his legal conclusion that State Oil set its prices at anti-competitive levels. Khan has raised no genuine issue of material fact as to a breach of covenant of good faith and fair dealing.

III. CONCLUSION

Accordingly, Defendant's motion for summary judgment is granted as to Counts I, II, and IV and Plaintiff's motion for summary judgment as to Count II is denied. Defendant's motion to strike the expert report, its motion to bar, and its motion in limine are denied as moot.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: November 13, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

BARKAT U. KHAN and KHAN & ASSOCIATES, INC.

v. CASE NUMBER: 94 C 35

STATE OIL COMPANY

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is granted summary judgment is granted [sic] in favor of defendant State Oil Company and against plaintiffs Barkat U. Khan and Khan & Associates, Inc.

Date: November 13, 1995

Clerk: /s/ H. Stuart Cunningham

(By) Deputy Clerk: _____